443

(9)

CORRECTED

No. 05-493

FILED

SEP 11 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ROBERT AYERS, Acting Warden,

Petitioner,

v.

FERNANDO BELMONTES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

BILL LOCKYER
Attorney General of the State of California
MARY JO GRAVES
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
ERIC L. CHRISTOFFERSEN
Assistant Supervising Deputy Attorney General
MARK A. JOHNSON
Assistant Supervising Deputy Attorney General
State Bar No. 179141
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Fax: (916) 324-2960
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. THERE IS NO REASONABLE LIKELIHOOD THAT BELMONTES' JURORS MISAPPLIED ANY OF THE INSTRUCTIONS TO PREVENT CONSIDERATION OF ANY CONSTITUTIONALLY RELEVANT EVIDENCE 1

A. Neither The Prosecutor Nor Defense Counsel Argued That Belmontes' Mitigation Evidence Could Not Be Considered Under The Factor (k) Instruction 2

B. The Court's Special Instruction Only Reinforced The Availability Of The Defense Mitigation Evidence For The Jurors' Consideration 5

C. There Is No Reasonable Likelihood That The Trial Court's Answers To Juror Questions Caused Any Confusion About The Permissible Scope Of Mitigating Evidence 8

D. The Jurors' Requests To Have Testimony Re-Read Reveal No Confusion About The Permissible Scope Of Mitigating Evidence 14

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE VIOLATES THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE* v. *LANE*, 489 U.S. 288 (1989) 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Belmontes v. *California*, 488 U.S. 1034 (1989) 17

Bollenbach v. *United States*, 326 U.S. 607 (1946)..... 14

Boyde v. *California*, 494 U.S. 370 (1990).....1, 15, 16, 18, 19

Brown v. *Payton*, 544 U.S. 133 (2005)..... 16, 18

Donnelly v. *DeChristoforo*, 416 U.S. 637 (1974)..... 3

Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 17

Hitchcock v. *Dugger*, 481 U.S. 393 (1987)..... 16, 17

Johnson v. *Texas*, 509 U.S. 350 (1993)..... 12, 14, 18

Jones v. *United States*, 527 U.S. 373 (1999) 9

Lambrix v. *Singletary*, 520 U.S. 518 (1997)..... 19

Lockett v. *Ohio*, 438 U.S. 586 (1978) 17

Penry v. *Lynaugh*, 492 U.S. 302 (1989)..... 16, 17

People v. *Boyd*, 38 Cal.3d 762, 700 P.2d 782, 215 Cal.Rptr. 1 (1985) 18

People v. *Kimble*, 44 Cal.3d 480, 749 P.2d 803, 244 Cal.Rptr. 148 (1988) 9

Skipper v. *South Carolina*, 476 U.S. 1 (1986)..... 17

Teague v. *Lane*, 489 U.S. 288 (1989) 1, 16, 19

Tuilaepa v. *California*, 512 U.S 967 (1994)..... 6

Weeks v. *Angelone*, 528 U.S. 225 (2000) 14

STATUTES

California Penal Code, § 190.3..... 18

REPLY BRIEF FOR PETITIONER

As demonstrated in the State's Brief on the Merits: (1) *Boyde* v. *California,* 494 U.S. 370 (1990), confirms that California's factor (k) instruction was constitutionally sufficient to allow the jury to consider Belmontes' mitigating character evidence of potential future adjustment to life in prison and, in any event, there is no reasonable likelihood that the jury did not consider such evidence in light of the facts of this case; and (2) the circuit court's holding that the factor (k) instruction did not allow consideration of such evidence violates the non-retroactivity doctrine of *Teague* v. *Lane,* 489 U.S. 288 (1989). Belmontes fails to refute any of these points.

I.

THERE IS NO REASONABLE LIKELIHOOD THAT BELMONTES' JURORS MISAPPLIED ANY OF THE INSTRUCTIONS TO PREVENT CONSIDERATION OF ANY CONSTITUTIONALLY RELEVANT EVIDENCE

Belmontes' opposition brief is conspicuous, not for what it asserts, but rather for what it *does not* challenge. Although Belmontes avers that the factor (k) instruction might be "least effective" with respect to evidence of future prison adjustment, he does not appear to have any significant quarrel with the instruction's constitutional sufficiency. Indeed, Belmontes apparently acknowledges that the factor (k) would generally provide sufficient guidance to allow jurors to consider "forward-looking" character evidence suggesting future adaptability to prison. Belmontes argues, however, that the fates somehow conspired *in his particular case* to mislead the jurors to disregard *his particular evidence* of future adaptability. Resp. Br. 19-20,

n. 3. As explained below, none of Belmontes' various fact-specific assertions, whether viewed individually or cumulatively, reveal any reasonable likelihood that the jurors in this case ignored any of his proffered evidence in mitigation.

A. Neither The Prosecutor Nor Defense Counsel Argued That Belmontes' Mitigation Evidence Could Not Be Considered Under The Factor (k) Instruction

Belmontes claims that the parties' closing statements confused the jurors about whether they could consider his evidence of future adaptability to prison. Resp. Br. 28-31. This argument is premised on isolated remarks that, when viewed in context, could not have been misinterpreted to preclude consideration of this evidence.

Belmontes' complaint about the prosecutor's closing argument rests entirely on the following comments about whether Belmontes' prior "religious experience" during his CYA commitment was cognizable under the "catch-all" factor (k) instruction: "I'm not sure it really fits in there [i.e. the factor (k)]. I'm not sure it really fits in any of them. But I think it appears to be a proper subject of consideration." J.A. at 154. From these remarks, Belmontes concludes that the prosecutor acknowledged that the evidence of future prison adaptability did not fall within any of the enumerated factors. Resp. Br. 28.

The prosecutor here said nothing to suggest that any potentially mitigating evidence was beyond the jury's reach. To the contrary, the fairest view of these remarks, when viewed in context, is that the prosecutor was merely arguing that Belmontes' evidence of a prior religious

conversion while incarcerated carried little if any *mitigating weight*. The prosecutor immediately followed these remarks with the observation that "it's no secret that the evidence upon which the defendant's religious experience rests is somewhat shaky." J.A. at 154. This comment was entirely fair in light of the fact that Belmontes' alleged religious awakening disappeared as soon as he was released from custody. Accordingly, the prosecutor properly warned the jury to view Belmontes' evidence of a "genuine and sincere religious experience" with "a grain of salt." J.A. at 154.

The prosecutor nonetheless acknowledged that the jurors *could* consider evidence of Belmontes' religious experience in determining his potential for future institutional adjustment: "I suppose you can say [Belmontes' religious awakening] would be appropriate because—in this fashion: The defendant may be of value to the community later." Indeed, the prosecutor told the jurors that they could, and *should*, consider Belmontes' future prospects: "And I think that value to the community [in the future] is something that you have to weigh in. There's something to that." J.A. at 155.

"[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647 (1974). In this case, no reasonable juror would have interpreted the prosecutor's comments to mean that factor (k) *legally prohibited* consideration of any of Belmontes' proffered evidence.

Belmontes also argues that defense counsel somehow confused the jury with the following comments:

> I'd like to comment about the evidence that we've presented and what [the prosecutor] told you he thought it means, and I'm not going to insult you by telling you I think it excuses in any way what happened here. That is not the reason I asked these people to come in.

J.A. at 166. Relying on these remarks, Belmontes faults his trial counsel for allegedly "conceding" that the factor (k) instruction did not permit consideration of his evidence. Specifically, he claims that this purported "concession reinforced the jury's confusion and uncertainty about whether the evidence of good future institutional adjustment was cognizable under the enumerated factors." Resp. Br. 30.

Trial counsel conceded nothing about any defense evidence allegedly being beyond the scope of the factor (k) instruction. Quite the contrary, trial counsel's remarks about not attempting to use the evidence to excuse the crime echoed the factor (k)'s plain language, which directed the jurors to consider "any other circumstance which extenuates the gravity of the crime *even though it is not a legal excuse for the crime*." J.A. at 184 (emphasis added).

Immediately after these comments, defense counsel went on to point out that the facts of the crime were insufficient by themselves to reveal the totality of Belmontes' potential value as a person. Then, in support of his plea for a sentence of life without parole, defense counsel effectively argued that, in light of the evidence of Belmontes' prior CYA commitment, he could "fit[ ] into the system"

and "contribute something" in the future while still suffering the "harsh penalty [of] life in prison without ever being released." J.A. at 166-170.

This argument related directly to the factor (k) instruction. Even thought there could be no *legal excuse* for the murder in this case, defense counsel's argument effectively urged the jurors to consider Belmontes' worth as a person, combined with his future potential as a life prisoner, as perhaps extenuating the gravity of his crime for purposes of their sentencing determination. That message would not have been lost on any reasonable juror. More importantly, no juror would have understood any portion of the defense argument as a concession that the factor (k) instruction precluded consideration of any relevant mitigating evidence.

In sum, neither the prosecutor nor defense counsel said anything to suggest that the jury could not consider any evidence in mitigation. In fact, both parties made it perfectly clear that the jurors could consider any such evidence.

B. The Court's Special Instruction Only Reinforced The Availability Of The Defense Mitigation Evidence For The Jurors' Consideration

In addition to the standard CALJIC 8.84.1 instruction, which culminated with the catch-all factor (k), the jurors were given the following "special instruction."

> I have previously read you a list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not

> allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.
>
> However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

J.A. at 185-186. Belmontes insists that the standard CALJIC 8.84.1 instruction and the "special instruction" were "internally inconsistent" so as to confuse the jurors about the proper guidelines of their sentencing responsibilities. This is so, according to Belmontes, because the standard CALJIC 8.84.1 instruction did not specify whether the various statutorily-designated factors were either "aggravating" or "mitigating." In the "special instruction," however, the jurors were in fact expected to distinguish between "aggravating" and "mitigating" circumstances. Thus, the reference to "aggravating" and "mitigating" circumstances in the "special instruction" allegedly confused the jurors about "whether there was a single list of relevant factors or separate lists of aggravating and mitigating factors." Resp. Br. 21-22.

It is true that many of the listed factors set forth in CALJIC 8.84.1 could serve as either aggravating or mitigating circumstances, depending on the facts the jurors found to be true. See *Tuilaepa* v. *California*, 512 U.S 967, 978-79 (1994). Belmontes' argument, however, presupposes

that his jurors were somehow unable to discern for themselves whether the evidence established any given factor as "aggravating" as opposed to "mitigating."

This argument strains credulity. The standard instructions themselves informed the jurors that it was *their duty to determine* whether the evidence established either "aggravating" or "mitigating" circumstances. The jurors were expressly told that, in deciding between a sentence of death or life imprisonment, they were to "weigh the mitigating circumstances against the aggravating circumstances that you find to be established by the evidence." J.A. at 185. Thus, even without reference to the "special instruction," the standard instructions already required the jurors to determine the existence of any applicable "aggravating" or "mitigating" circumstances, based on the evidence presented. Belmontes does not explain how his jury, or any other California jury given these same standard instructions, would be unable to make such a commonsense determination.

Accordingly, there is virtually no chance—let alone a reasonable likelihood—that the jurors were confused about their role in finding whether the evidence established any aggravating or mitigating circumstances for purposes of their penalty judgment. As set forth at length in the State's Brief on the Merits, the factor (k) instruction was alone sufficient to allow the jurors to consider, and give effect to, all of Belmontes' proffered evidence in mitigation. The "special instruction" only reinforced to the jurors that they could consider *any* relevant circumstance in mitigation. The "special instruction" expressly limited the jurors' consideration of *aggravating circumstances* to the factors that had been previously enumerated. Conversely, the "special instruction" expressly clarified that

mitigating circumstances were not limited to those that had been enumerated. J.A. at 185-186. The "special instruction," therefore, certainly did not create any confusion. To the contrary, this "special instruction" eliminated any chance that the jurors might have misunderstood the catch-all factor (k) to foreclose consideration of any relevant mitigating evidence.

C. There Is No Reasonable Likelihood That The Trial Court's Answers To Juror Questions Caused Any Confusion About The Permissible Scope Of Mitigating Evidence

Belmontes' opposition focuses on the jurors' various questions to the trial court during an informal mid-deliberation colloquy. Belmontes expends considerable energy speculating about how these questions might have reflected some sort of juror confusion and about how the court's responses to those questions might have reinforced this alleged confusion. Resp. Br. 22-28. These arguments are puzzling because the Ninth Circuit's opinion did not turn on, or even rely on, any of these assertions.

Although the Ninth Circuit panel majority found that the juror questions might have revealed some misunderstanding, the panel noted that it "did not need to rely on affirmative evidence of juror confusion [as allegedly revealed by juror questions] in order to reach [its] conclusion." Instead, the panel below found that the juror questions merely "strengthen[ed] [its] conclusion that the original and supplemental instructions did not convey to the jury that it could consider Belmontes' nonstatutory mitigating evidence pertaining to his probable future in prison if incarcerated for life." P.A. at 296a-297a, n. 19. Belmontes is now, in effect, asking this Court to disregard

the circuit court's overriding holding regarding the constitutionality of the factor (k) instruction. Belmontes instead seeks to shift the inquiry toward the trial court's mid-deliberation colloquy, which was not essential or even particularly germane to the lower court's analysis.[1]

Belmontes' complaints about the juror questions fare no better than his argument about the "special instruction." First, he argues that the trial court's answers to Juror Hern's questions conveyed the message that the jury's consideration of mitigating circumstances was limited to a "circumscribed and finite number of permissible factors. . . ." Resp. Br. 24. Second, he claims that the court's answer to Juror Hailstone's question "confirmed" that the jury's consideration of mitigating circumstances was confined to these "specifically listed factors." Resp. Br. 27.

None of the jurors' questions expressed any confusion about whether they could consider Belmontes' proffered evidence in mitigation. The mid-deliberation discussion with the court was prompted solely in response to the jurors' request for information about the consequences of their possible inability to reach a unanimous verdict. The judge informed them that he could not give them such information.[2] After advising the jurors to review the

---

[1] Belmontes' efforts in this regard are understandable because, as noted in the State's Brief on the Merits, his complaint about the trial court's mid-deliberation discussion with Juror Hern was Belmontes' sole claim of instructional error presented to the Ninth Circuit.

[2] As the California Supreme Court held, the trial court properly refrained from informing the jurors of the consequences of their possible inability to reach a verdict. P.A. at 221a-222a; see *People* v. *Kimble*, 44 Cal.3d 480, 511-515, 749 P.2d 803, 826, 244 Cal.Rptr. 148, 168, 171 (1988); see also *Jones* v. *United States*, 527 U.S. 373, 381-382

(Continued on following page)

previous instructions, the court ascertained from them that they might be able to reach a unanimous verdict after reviewing the instructions and deliberating further. J.A. at 188-190.

Only then did Juror Hern ask, "The statement about the aggrevation (sic) and mitagation (sic) of the circumstances, now, that was the listing?" Juror Hern also asked, "Of those certain factors we were to decide one or the other and then balance the sheet?" The trial court answered these questions, respectively, with the following responses: "That was the listing, yes, ma'am" and "That is right. It is a balancing process." J.A. at 191.

The juror's use of the term "listing" did not suggest an unconstitutionally restrictive view of the permissible scope of mitigating evidence.[3] Nor did her use of the metaphor "balance the sheet" reveal any confusion about her role or duties in deciding the proper penalty. Neither of these questions required, or even suggested, that the court should provide any additional clarification beyond the very clear instructions already given. To the contrary, these questions merely indicated that Juror Herm was *confirming* her understanding of the proper procedure under

---

(1999) (the federal constitution does not require a penalty-phase jury to be informed of the consequences of the inability to reach a unanimous verdict).

[3] Indeed, to accept Belmontes' claim that the juror's reference to "listing" might somehow reveal an improperly limited view of the available mitigating circumstances, one must first accept the Ninth Circuit's view that factor (k) would in fact be misunderstood to limit the scope of available mitigating circumstances. However, as discussed at length in the State's Brief on the Merits, no reasonable juror would have misinterpreted factor (k) to prohibit consideration of any of Belmontes' evidence.

California law of balancing mitigating and aggravating circumstances in arriving at a penalty judgment. The court's responses were proper because, as the jurors had already been instructed, their penalty judgment required them to determine whether "the mitigating circumstances outweigh the aggravating circumstances." J.A. at 185.

A moment later, Juror Hailstone asked, "I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The trial court's response—"That is something you cannot consider in making your decision"—was proper because there had been no evidence concerning the need for, or the availability of, any such treatment. J.A. 191. Once again, Juror Hailstone's inquiry did not suggest any confusion requiring further clarification.

To the contrary, the question about possible future psychiatric treatment reveals that the jurors were *already considering* Belmontes' possible future as a life prisoner. The trial court's response would not have deterred reasonable jurors from considering any *evidence* concerning Belmontes' future prospects. Indeed, the initial portion of Juror Hailstone's inquiry—"I don't know if it is permissible"—reflects a tacit understanding that he was requesting information beyond the evidence presented. Such an acknowledgment is not surprising because the jurors had been expressly instructed that it was their duty "to determine the facts from the evidence received *and not from any other source.*" J.A. 175 (emphasis added.)

The jurors in this case were not shy or reluctant to ask questions if they wished clarification on points of law. If the jurors had been uncertain about whether they could consider *any evidence* for any potential mitigating purpose,

they almost certainly would have voiced such concerns to the trial judge, who was plainly receptive to their questions. Yet none of the juror questions suggested even remotely that they were confused about whether they could consider any evidence as possibly relating to future adaptability or to *any* potential circumstance in mitigation. Nothing in any of the trial court's proper responses to these questions would have misled any juror to believe he or she could not use Belmontes' proffered evidence for any constitutionally permissible purpose. For these reasons, this is not a case where constitutional error might be gleaned from subtle interpretations of informal juror questions.

Even if it were permissible for a federal habeas court to divine an Eighth Amendment violation from such vagaries, the actual instructions given here obviate virtually any chance that the jurors in this case were misled to ignore any of Belmontes' "forward-looking" evidence. As discussed in depth in the State's Brief on the Merits, *Boyde* confirms that the catch-all factor (k) instruction permitted the jury to consider all of the background and character evidence that served as the entire basis for Belmontes' argument about his future adaptability to life in prison. Moreover, this same standard instruction's direction to consider "[t]he age of the defendant at the time of the crime" (J.A. at 184), allowed the jury to take account of Belmontes' youth. This directive to consider Belmontes' youth provided *yet another* avenue for the jury to consider his possible future prospects. *Johnson* v. *Texas*, 509 U.S. 350, 368 (1993). Finally, the additional "special instruction," which informed the jury that potential mitigating

circumstances were not limited to those previously listed, foreclosed virtually any chance that the jurors would feel compelled to ignore any potential mitigating factor established by the evidence.

The trial judge advised the jurors to review these instructions during this mid-deliberation exchange. Belmontes, however, quibbles with the State's assertion that the trial court's advisement amounted to a "direction" for the jury to re-read the instructions. As Belmontes points out, the trial court's reference to re-reading the instructions came in the form of a question to the jury. Specifically, the court, in response to the jury's inquiry regarding the consequences of a deadlock, inquired, "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?" Two jurors assented to this proposal and the court replied, "I think so. I think you need more time."

Although the court's "directive" came in the form of a question, it still retained the force of an instruction to the jury on how to proceed. The judge specifically inquired whether more time and a review of the instructions would help the jury in its deliberations. That specific inquiry notified the jury of the course of action it was to take in an effort to resolve a possible deadlock. Once the jury agreed that such actions might be helpful, there was no need for the court to affirmatively direct the jurors to do what they had just agreed to do. The jury's assent to the court's inquiry was obviously an acceptance of the court's direction of how the jury was to proceed. Accordingly, Belmontes' claim that the trial court did not "direct" the jury to review the instructions is not supported by the record.

There is also nothing in the record to indicate that the jury did not follow the court's advisement to review the instructions. See *Weeks* v. *Angelone*, 528 U.S. 225 (2000) (no likelihood of confusion where the trial judge referred jury back to original instructions when the jury asked a question regarding the instructions themselves). Indeed, the jury would have attributed "great weight" to the directive to review the instructions, which the trial court gave in response to their questions. *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946). Even if some juror confusion might have existed, a review of these instructions would have resolved it.

The jurors in this case were clearly aware of the solemn nature of their penalty determination and, therefore, would reasonably have given a broad interpretation of potential mitigating circumstances. *Johnson* v. *Texas*, 509 U.S. at 370. Every rational inference to be drawn from the record indicates that the jurors did in fact embrace an expansive view of potential mitigating circumstances.

D. The Jurors' Requests To Have Testimony Re-Read Reveal No Confusion About The Permissible Scope Of Mitigating Evidence

The morning after the trial court held the mid-deliberation discussion with the jury, the jurors asked to have Belmontes' testimony, the pathologist's testimony, and Bob Bolanos[4] testimony re-read to them. J.A. at 195. Belmontes now asserts perfunctorily that this request to re-hear testimony about the underlying murder somehow

---

[4] Bolanos was one of the accomplices to the residential burglary that resulted in Belmontes' murder of Steacy McConnell.

"confirm[s] that [the jurors] were diverted from the mitigation evidence of future institutional adjustment and refocused on the circumstances of the crime, narrowly defined." Resp. Br. 31.

Belmontes' argument reduces serious constitutional analysis to the level of reading tea leaves. It is hardly surprising that this jury wanted to review the evidence of the murder before arriving at a final penalty verdict. The jurors were instructed that, in considering the proper penalty to be imposed, they were to consider "all of the evidence which has been received during any part of the trial in this case. . . ." J.A. at 183. The first "factor" set forth in the standard CALJIC 8.84.1 instruction directed them to consider "[t]he circumstances of the crime of which the defendant was convicted. . . ." J.A. at 184. The prosecution conceded repeatedly that the evidence presented concerning Belmontes' background was "a wash" with respect to aggravation and mitigation, with the decisive sentencing factor being the circumstances of the crime itself. J.A. at 158-160.

The jurors' request to review evidence of the crime itself does not disclose a repudiation of the clear instructions in this case or a decision to ignore any of Belmontes' evidence of future adaptability to prison. This claim, like all of Belmontes' arguments, constitutes precisely the type of speculative legal hairsplitting condemned in *Boyde*. *Boyde*, at 380-81.

Several witnesses testified, without objection, in support of Belmontes' argument of future institutional adjustment. As in *Boyde*, the factor (k) instruction permitted consideration of all this evidence, and the additional special instruction confirmed that the jury

could consider *any* mitigating factor established by the evidence. Neither the court nor any of the parties or witnesses said anything to suggest that the jury could not consider Belmontes' possible future prison adjustment. For the jurors to have nonetheless felt compelled to reject all such evidence, in contravention of everything that had been said and presented, they would have to have believed that the penalty phase trial was a pointless exercise or, as stated in *Boyde*, "a virtual charade." *Boyde*, at 383-84; see also *Brown* v. *Payton*, 544 U.S. 133, 144 (2005) ("like in *Boyde*, for the jury to have believed it could not consider Payton's mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all").

II.

THE NINTH CIRCUIT'S DECISION IN THIS CASE VIOLATES THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE* v. *LANE*, 489 U.S. 288 (1989)

Belmontes' response to the State's *Teague* claim is notable for what it *does not* say. In particular, Belmontes nowhere addresses the necessary import of this Court's subsequent decisions in *Boyde* and *Payton* in assessing whether the Ninth Circuit's holding in this case was dictated by controlling precedent existing at the time his judgment became final.

Instead, Belmontes relies on *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), and *Penry* v. *Lynaugh*, 492 U.S. 302

(1989).[5] Neither of these decisions dictated the Ninth Circuit's holding in this case.

In *Hitchcock*, this Court affirmed the previous holdings in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), and *Skipper* v. *South Carolina*, 476 U.S. 1, 7 (1986), in concluding that a capital sentencer may not be "instructed not to consider," and may not "refuse[ ] to consider, evidence of nonstatutory mitigating circumstances" such as the "testimony concerning petitioner's family background and his capacity for rehabilitation." *Hitchcock*, at 398-99. In *Penry*, the Court found that the Texas statute was facially insufficient to satisfy the Eighth Amendment *in that particular case* because, without some additional instruction, Texas' three "special questions" precluded the jurors from considering or giving *any mitigating* effect to Penry's evidence of his mental retardation and abused childhood. *Penry*, at 320-28.

These cases merely confirm the principle, set forth in *Lockett* and its progeny, that a state "may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the

---

[5] Notably, *Penry* was not decided until after Belmontes' judgment had become final and, therefore, could not have dictated the circuit court's holding. Indeed, the timing of the *Penry* decision and this Court's disposition of Belmontes' certiorari petition from his direct state appeal suggests that *Penry's* reasoning does not apply in this case. Among the questions presented in that petition, Belmontes claimed generally that the trial court's instructions and answers to juror questions prevented the jury from considering his mitigating evidence. Resp. Br. 46. This Court denied Belmontes' certiorari petition during the same period it was considering its decision in *Penry*. *Belmontes* v. *California*, 488 U.S. 1034 (certiorari denied January 17, 1989); *Penry* v. *Lynaugh*, 492 U.S. 302 (matter argued January 11, 1989, decided June 26, 1989).

inquiries to which it is relevant so severely that *the evidence could never be part of the sentencing decision at all.*" *Johnson* v. *Texas*, 509 U.S. at 361 (emphasis added, quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 456 (1990), Kennedy, J., concurring).

At the time Belmontes' judgment was pending, it was established that California's capital statute permitted consideration of all mitigating evidence. *People* v. *Boyd*, 38 Cal.3d 762, 775, 700 P.2d 782, 791-92, 215 Cal.Rptr. 1, 10-11 (1985). The instruction at issue recited the California statute verbatim (J.A. 183-184; Cal. Pen. Code, § 190.3), and no authority extant at that time dictated the conclusion that jurors would misinterpret the catch-all factor (k) to foreclose consideration of any relevant mitigating evidence.

Indeed, this Court's subsequent decision in *Boyde* confirms that the factor (k) instruction, even "standing alone," would be reasonably understood to permit consideration of mitigating evidence unrelated to the crime, such as a defendant's background and character. *Boyde*, at 380-382. In light of *Boyde*, it certainly cannot be said that any prior precedent dictated the circuit court's holding that factor (k) would likely prevent jurors from considering character evidence tending to show prospects for institutional adjustment.

Moreover, the subsequent decision in *Payton* reveals that the Ninth Circuit's purported distinction between "general" character evidence and "forward-looking" character evidence relating to future adaptability was not dictated by prior precedent. Because it was *at least reasonable* for the state court to conclude that *Boyde* applied to Payton's "forward-looking" post-crime evidence (*Payton*,

at 141-143), it was also reasonable to conclude, even before *Boyde*, that factor (k) permitted consideration of Belmontes' "forward-looking" evidence of prior institutional adjustment. It certainly would not have been "apparent to all reasonable jurists" at that time that the instruction at issue violated the Eighth Amendment. *Lambrix* v. *Singletary*, 520 U.S. 518, 528 (1997).

In sum, the Ninth Circuit's decision to grant habeas relief in this case was not dictated by earlier precedent and, therefore, is barred under *Teague*.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Dated: September 11, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
MARY JO GRAVES
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
ERIC L. CHRISTOFFERSEN
Assistant Supervising Deputy
Attorney General

MARK A. JOHNSON
Assistant Supervising Deputy
Attorney General
Counsel of Record

Counsel for Petitioner